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Supreme Court, U.S.
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No. 91-1723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THOMAS G. CLINES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a taxpayer can be convicted of wilfully failing to disclose a "financial account in a foreign country" on his federal income tax return and failing to file a report disclosing said interest where the applicable laws, regulations, judicial opinions and tax return instructions are ambiguous regarding the definition of a "financial account" and "financial institution?"

2. Whether Independent Counsel Lawrence Walsh had the legal and constitutional right to prosecute Petitioner for tax violations for failing to disclose a "financial account in a foreign country" as a result of the Independent Counsel's general appointment to investigate certain events of the "Iran-Contra Affair?"

3. Whether a taxpayer who is a citizen and resident of the State of Virginia for 40 years, who has continuously filed returns and forms by mail from his home to the IRS, can be tried in the District Court for Maryland for violations relating to his income tax returns and for failing to file related Treasury Forms?

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 958 F.2d 578.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1992. The petition for a writ of certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner disputes the factual conclusions presented by Respondent, United States of America. The Statement is replete with inaccuracies and exaggerations:

1. Respondent claims Petitioner "hid" from the United States Government the fact that he made money in the

Iran/Contra Affair. B.I.O.[1] at 2. There is no record citation for this conclusion. There was no evidence that Petitioner "hid" his funds. Petitioner worked merely as a functionary. TR. 765.[2] Petitioner deposited his money in a United States bank by wire transfer in full view of the U.S. Government. TR. 184, 1218.

2. Respondent claims that Petitioner maintained two "secret" accounts in Switzerland. There is no record citation. It is untrue. The so-called "capital account" was nothing more than an account payable owed to Petitioner *by* CSF, a company run by one man (Willard Zucker). To the extent that a private enterprise account payable is "secret" or non-public, then it was. Commonly, most accounts payable in business enterprises are non-public. TR. 196, 209, 1219.

3. Respondent claims that Petitioner directed the funds in the capital account. B.I.O. at 3. However, the evidence, uncontradicted, established that the control of the accounts, the organization of the enterprise, the ownership thereof, was in the hands of Zucker (who was CSF), Hakim and Secord. Petitioner, was simply an employee. TR. 196, 206, 1215.

4. Respondent omits to mention Petitioner's Amended Return (which was begun *before* any investigation) in an attempt to characterize Petitioner as a tax cheat. See B.I.O. at 5. This was *not* a tax evasion case.

5. Petitioner did not consider (nor would the average taxpayer) an account payable as a "financial account in a foreign financial institution."

6. The Government contends that the amended returns were also inaccurate in their statement of gross receipts. The Government admits that Petitioner was an intermediary for other foreign funds. B.I.O. at 6. However, the record is entirely unclear as to the amount of gross

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[1] "Brief of Respondent, United States of America, in Opposition to the Petition for Certiorari" filed May 27, 1992.

[2] "TR." is Transcript of Trial.

receipts and expenses attributable to Clines because of the nature of Clines' activities. Moreover, the government's case was not for tax evasion, but for failure to report a foreign financial account.

7. The Government contends that "Petitioner opened an account with CSF". B.I.O. at 4. There was no evidence that Petitioner opened anything. TR. 196, 206. Mr. Zucker opened an account and labeled it "C.Tea." There was no evidence that Petitioner did anything to "open" or characterize the account.

8. The Government contends that Petitioner, who filed his tax returns from Virginia (where he lived) "repeatedly" met and corresponded with his accountant in Maryland. The Government ignores Mr. Clines residency and the fact that he met with his accountant many times in the District of Columbia and in Virginia and that Clines completed the returns in Virginia. TR. 787, 789.

9. The Government contends that Mr. Clines lied to his accountant regarding a foreign "account." B.I.O. at 5. There was no such evidence.

10. The Government contends that Petitioner had prior knowledge of the reporting requirements. B.I.O. at 5. This is true. When he had a foreign bank account, he reported it. See Petitioner's lodging materials, page 11. TR. 707.

11. The Government contends that Petitioner lied about his gross receipts. B.I.O. at 6. The evidence demonstrated that what gross receipts were and were not properly includable in his income was confused and complicated. TR. 210, 765. Petitioner was used as a intermediary for the movement of Enterprise funds, and expenses. TR. 162. Mysterious deposits from foreign sources were deposited in Petitioner's accounts. An army of IRS accountants had to work months to try to straighten out the accounting mess. To this day no one can tell with certainty what was and was not Petitioner's money. TR.

219, 223. The Government simply chose to conclude that Clines should be attributed with all of it.

12. The Government omits to state that one of the owners of the CSF funds, Richard Secord, a *Government witness*, testified that the books and records presented by the Government to establish the gross recipts of and attributed profits to Mr. Clines, were "cooked" or false. TR. 210, 211, 219. Mr. Zucker admited that the documents were "recharacterized."

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Vagueness of the Instruction on the Tax Return Form.

The Government contends that Petitioner should not be able to raise his attack on the convictions based upon unconstitutional vagueness, because that argument was not precisely made below. The Government cites *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992). The Government concedes that Petitioner vigorously attacked the language of the tax return question on the Form 1040 the Treasury Form T.D. 90-22.1 and statute in both the Trial Court and the Court of Appeals.

Yee, supra, confirmed the ability of a Petitioner to refine or reframe his arguments, provided the claim was made below. *Id*; 112 S.Ct. 1522 at 1532. Moreover, this Court has repeatedly held that in cases arising from federal courts, the non-review rule is prudential only. See, e.g. *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1490, n. 2. (1980).

Clearly, this Court can, and should review the question. Inherent in the ease with which the Fourth Circuit fit the facts within the statute and regulations, was a determination that the tax return, the form, and the

statute were clear, and unambiguous. In fact, the Court held the terms were "broadly defined."

This court, can, if it wishes, review the arguments raised by Petitioner. On occasion this Court has even considered, and corrected, error *not raised*, by a Petitioner. See *Nixon v. Fitzgerald*, 457 U.S. 731, n. 23 (1982).

The Government contends that Petitioner must concede that the activities of which he was found guilty, fit easily within the regulatory and statutory scheme. B.I.O. at 9. Petitioner concedes nothing of the kind here. It is true, however, that Petitioner's counsel in the Court below did concede that in 1986 only, the money owed Petitioner could arguably fit within the regulatory definitions. That concession affected Count II of the Indictment only. See Pet. App. at 5a. That concession was unfortunate, inappropriate, and inaccurate.

However, whether or not lawyers could easily fit "accounts payable" into the broad definitions approved by the lower court, the fact remains that the Tax Form must be viewed from the perspective of the ordinary, reasonable taxpayer. From that view, it is unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983).

The Government supports its defense of the clearly vague tax form by contending that the complex statute and regulations are very specific and yet all-inclusive. Even a cursory review demonstrates, however, that the terms used on the tax form ("bank account, securities account or other financial account") are misleading. Moreover, even the instructions on the Form TD 90-22.1 (which follows after the Tax Form questionnaire) are ambiguous as to what is, precisely, a "financial institution."

The Government supports the convictions based upon the tax form trap by pointing to Petitioners past experi-

ence with Form TD 90-22.1.[3] (See Petitioner's Lodging Materials, page 11.) Petitioner filed the form when he had a foreign bank account—clearly a foreign "financial institution" in the common parlance.

B. Willfulness.

The Government contends that by charging the jury on the standards of willfulness, the error in the jury instructions was cured. B.I.O. at 12. It was easy for the jury to find "willfulness" when the judge instructed them that the account was a "foreign financial account in a financial institution." See Pet. App. at 37a. It was also grievous, prejudicial error.

The trial court never told the jury what the terms on the form meant. It was an incomplete instruction. While the Court gave complete, elaborate definitions of "willfulness," the equally important terms which had legal criminal significance, were unfortunately left vague and undefined. See, *United States v. Gamber*, 607 F.2d 92 (5th Cir. 1979).

II. INDEPENDENT COUNSEL WALSH HAD NO AUTHORITY TO PROSECUTE THOMAS G. CLINES FOR INCOME TAX VIOLATIONS AND FAILURE TO FILE TREASURY FORMS.

The Government's only response[4] to Petitioner's arguments is that the tax return and treasury form viola-

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[3] The government contends here that the Petitioner did not "pay taxes" on his income. B.I.O. at 11. This was not a tax evasion case. That matter is hotly disputed in Tax Court. Indeed, as the Trial Court charged the jury:

> "Mr. Clines is not charged with understating his total liability nor is there any criminal charge relating to whether or not he paid any amount of tax due for the years 1985 and 1986."

[4] In a footnote at B.I.O. Page 15, the Government makes certain uncharged accusations, unsupported by the record, about alleged false affidavits to Congress. Suffice it to say that if there was a basis to such charges, Mr. Clines surely would have been indicted for them.

tions "arose" out of or "relate to" the sale of arms to Iran and to the Contras. Mr. Walsh argues that it is limitless.

The District Court in *United States v. Secord*, 725 F. Supp. 563 (D.D.C. 1989), considered the limits of jurisdiction of Mr. Walsh. While it found those areas wide, there *are* outer boundaries. The Court opined:

> In permitting the Independent Counsel to prosecute crimes "arising out of" the Iran-Contra events, here Defendant's alleged perjury, the Special Division fell well within the standard of section 593(b)(3), as clarified by the Court. Just as Defendant's conduct "arose out of" the sale of arms to Iran and the diversion of proceeds, it is "demonstrably related" thereto. To demonstrate that one occurrence is "related" to another, one need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between the events.
>
> That connection is present here. The congressional investigation, the questions directed at Defendant and Defendant's answers all bear an undeniable factual relationship to the events giving rise to the appointment of the Independent Counsel. This relationship is strengthened by the congressional investigation's temporal and logical connection to the events, see discussion supra, at 564-65. Once again, the Independent Counsel could reasonably view the actions of General Secord as simply an additional part, another component of the crimes for which he and three others were originally indicted.
>
> By supplying the example of Defendant's future copyright violation in writing his Iran-Contra memoirs, Defendant argues that even the most attenuated factual relationship would permit a prosecution. Precisely the opposite, however, is true. The Supreme Court in *Morrison* called for more than a relationship between the events which is stretched far over time and factually suspect. The relationship must be "demonstrable," that is, something which is evident

> initially and without great leaps of logic. The courts are routinely called upon to draw lines, and this simply is another of those cases.

It does seem inconceivable, however, that a private employee's failure to check a box and income tax form was the type of case Congress expected to be pursued by an Independent Counsel.[5]

The tenuous relationship to Iran/Contra especially in view of what was supposed to be investigated is startling. Under this theory, anyone of the hundreds of people working in any capacity or status could be targeted. Clearly, this is not what Congress intended by the so-called "limited jurisdiction" of the Independent Counsel.

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[5] This Court did not apparently expect it either. Indeed, this Court in *Morrison v. Olson*, 108 S.Ct. 2597 at 2609 (1988) stated:

> Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of the particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel, *Germaine*, supra, 9 Otto, at 511, are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

III. THE FOURTH CIRCUIT COURT OF APPEALS DECISION DENYING PETITIONER HIS STATUTORY AND CONSTITUTIONAL RIGHT TO A TRIAL WHERE THE PETITIONER RESIDED AND THE RELEVANT CIRCUMSTANCES SURROUNDING THE CONTESTED ISSUES WERE LOCATED, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Government completely ignores 18 U.S.C. § 3237(b) which is directly applicable to this case, was not waived, and required prosecution in Petitioner's state of residence. The Governnment also completely ignores the fact that the venue issue was required to be submitted to the jury, and was not.[6] See *Green v. United States*, 309 F.2d 852, 856-57 (5th Cir. 1962).

Yet the Government incredibly claims that since Form 90-22.1 could be filed in any local office of the Internal Revenue Service, and since Maryland has a local office, Petitioner could be dragged there. This argument would give the Government nationwide venue, since every state (and even foreign countries) has a local IRS office. B.I.O. at 16. There is nothing to suggest Congress intended nationwide venue. See *United States v. Yeuse*, 387 F.Supp. 132, 134 (E.D.Wis. 1975).

In the very next sentence, the Government contends that this "nationwide" venue argument is also "consistent" with Petitioner's Six Amendment rights. This, of course, is inconceivable and at odds with well established law. See *United States v. Anderson*, 66 S.Ct. 1213, 328 U.S.

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[6] *United States v. Rooney*, 886 F.2d 28 (2d Cir. 1989) does not assist the Government. There the taxpayer filed the return from a district in which he did not live or work. His venue argument was clearly artificial and contrived. The taxpayer and his accountant in fact worked and resided in the same district, where the false return was prepared and where he was correctly tried. Here Clines lived for 40 years in Virginia, the IRS considered it his tax base, and he filed from Virginia, where the returns were completed. That is also where he could have filed a T.D. 90-22.1.

699 (1946); *Johnson v. United States*, 351 U.S. 219 at 221, 76 S.Ct. 739 at 743 (1956); *United States v. Johnson*, 323 U.S. 273 at 274, 65 S.Ct. 249 at 250 (1945).

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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